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THE DANGERS OF LIBERAL NEO-COLONIALISM: ELEPHANTS, IVORY AND THE CITES TREATY

THADDEUS MCBRIDE*

THE DILEMMAS OF AFRICANIZATION: CHOICES AND DANGERS FOR SUB-SAHARAN AFRICA. By L. DALTON CASTO. California: African Ways Publishing. 1998. Pp. 280.

*Every man has the right to decide his own destiny.*¹

—Bob Marley

The mascot of Kenya's tasty national beer, Tusker, is an elephant. Trumpeting mightily into the air, the large elephant dominates the label of Tusker bottles. Tusker's motto, "My country, my beer," further serves notice that this is a product about which Kenyans feel strongly. It is not surprising, therefore, that Kenya Breweries, the maker of Tusker, chose the elephant to represent the beer. It may not be king of the jungle, but as a symbol of national pride, the elephant rules supreme.²

African elephants have no natural enemies other than man.³ It is humans alone, therefore, who will decide the fate of these remarkable creatures.⁴ Unfortunately, in recent years though, we have not done an effective job of protecting elephants from ourselves.⁵ As a result, ele-

* Staff Writer, BOSTON COLLEGE THIRD WORLD LAW JOURNAL. The author would like to thank Professor David Wirth for his insights. This Note is dedicated to Christian Wright.

¹ Bob Marley, *Zimbabwe*, on SONGS OF FREEDOM (Island Records 1992).

² See James Macharia, *Castle's Ranger Brew on Hold After Patent Challenge*, BUSINESS NEWS (Johannesburg), Dec. 24, 1998, available in LEXIS, News Library, Most Recent 90 Days File (discussing distinctiveness of Tusker's elephant logo).

³ See Michael J. Glennon, *Has International Law Failed the Elephant?*, 84 AM. J. INT'L L. 1, 2 (1990). Glennon notes that on occasion, lions will prey upon newborn elephant calves. See *id.* His article extensively details the lives and characteristics of African elephants. See *id.* at 2-5. Around the world, people of all ages are fascinated by elephants. See Laurie Willis, *Tracking Elephants on the Web*, RALEIGH NEWS & OBSERVER, Jan. 18, 1999, at A3.

⁴ See generally Glennon, *supra* note 3.

⁵ See Importation, Exportation, and Transportation of Wildlife; Special Rules for Import and Export of African Elephant Ivory, 54 Fed. Reg. 19417, available in 1989 WL 304395 [hereinafter Importation]. As this report explains, elephant populations in parts of Africa have diminished by up to 90% in recent decades. See *id.*

phant populations have declined, a drop mainly attributable to poaching.⁶

The international community has taken some steps to reverse this trend.⁷ In particular, the United Nations adopted the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES" or "the Convention"), which entered into force in July, 1975.⁸ In addition to trying to protect elephants, CITES generally acknowledges the importance of protecting all fragile wildlife, and creates guidelines by which to do so.⁹ This pursuit is admirable, yet it presents problems to the international legal order in the way it impinges on individual state sovereignty.¹⁰ Nowhere is this more evident than in the controversial ivory ban, enacted in 1989 following the seventh CITES Conference of Parties (COP7).¹¹

The debate about CITES serves as a strong reminder that Africa is not far removed from the imperial era.¹² L. Dalton Casto explores the history of post-colonial Africa in his recent book, *The Dilemmas of Africanization: Choices and Dangers for Sub-Saharan Africa*.¹³ His work specifically focuses on the four countries, Botswana,¹⁴ Namibia,¹⁵ Zim-

⁶ See *id.* at 19417.

⁷ See Convention on International Trade in Endangered Species of Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 1087 [hereinafter CITES].

⁸ See *id.*

⁹ See *id.* at 1090.

¹⁰ See Jeffrey L. Dunoff, *Reconciling International Trade with Preservation of the Global Commons: Can We Prosper and Protect?*, 49 WASH. & LEE L. REV. 1407, 1424 (1992).

¹¹ See Christopher Munnion, *Poachers Profit from Easing of Trade Ban*, DAILY TELEGRAPH (London), Oct. 31, 1997, at 18. In fact, the ivory ban has provided fodder for pundits who question the merits of CITES on the whole. See *id.* Under the terms of the Convention, the Secretariat is to call meetings of all the parties no more than two years apart. See CITES, *supra* note 7, art. XI, 27 U.S.T. at 1104.

¹² See Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 AM. U. J. INT'L L. & POL'Y 903, 909 (1997) (discussing the fact that when institutions were created in colonial Africa, little account was taken either of an action's effect on the people of the country, or of the appropriateness of Western-style policies in the respective country). For the purposes of this book review, any reference to Africa means sub-Saharan Africa.

¹³ See generally L. DALTON CASTO, *THE DILEMMAS OF AFRICANIZATION: CHOICES AND DANGERS FOR SUB-SAHARAN AFRICA* (1998). Casto, an American business and economic consultant, has spent considerable time in Africa working with native governments and groups. See *id.*

¹⁴ See *id.* at 63-71. Casto describes Botswana's remarkable and long-running democracy. See *id.* Particularly noteworthy is the fact that the country is totally land-locked and largely desert. See *id.* at 63.

¹⁵ See *id.* at 135-44, 153-90. Namibia, until recently a South African colony, gained its independence in 1990. See *id.* at 180-81. Casto traces the course of Namibia's history until independence, emphasizing how the country factored into the battle against South African apartheid. See *id.* at 135-44, 153-90.

babwe,¹⁶ and South Africa (RSA),¹⁷ that comprise most of Southern Africa. Casto particularly discusses RSA's apartheid state, and describes its transformation into a democracy.¹⁸ Though uncertain about RSA's future, Casto compares the country favorably with the other African nations he has visited and studied.¹⁹ In general, Casto is not confident that the democratic pursuit will be easy for any African nation, concluding that state mismanagement and Western apathy most likely will doom the region.²⁰

Perversely, the tension created by CITES is a product of effective African management, and an overabundance of Western intervention.²¹ In short, CITES sets limits on the trade in elephant ivory, a diminution southern African states believe is unwarranted.²² The debate about CITES also implicates different opinions about the extent to which local communities should be involved in elephant management.²³ No one contests the need to develop programs that ensure sustainable development.²⁴ The dispute centers on how best to achieve this objective; that is, how to establish an environment in which elephants, agriculture and human beings can co-exist peacefully.²⁵

Using Casto's narrative as a springboard, this book review seeks to provide some answers. Section I briefly evaluates CITES, and the provisions of it that most affect the trade in ivory. Section II describes the ivory ban enacted in 1989, and its effect until it was rescinded in 1997. Section III explores ways different countries have tried to manage their elephant populations. This book review concludes that the ivory trade should be continued, and that the best way to sustain both the trade and elephant populations, is through culling.²⁶ Contrary to Casto's

¹⁶ See *id.* at 17-44. Zimbabwe, which gained independence in 1980, has labored under mismanagement, economic problems and property inequalities. See *id.*

¹⁷ See *id.* at 73-134, 191-264. Casto's discussion of South Africa covers the bulk of the book. See *id.* This book review does make references to South Africa and to its attitude towards CITES, but it primarily focuses on Botswana, Namibia and Zimbabwe. See *infra* Parts I-III.

¹⁸ See CASTO, *supra* note 13, at 206-63.

¹⁹ See *id.* at 243-44.

²⁰ See *id.* at 265-73.

²¹ See generally Patty F. Storey, Student Article, *Development vs. Conservation: The Future of the African Elephant*, 18 WM. & MARY J. ENVTL. L. 375 (1994) (tracing the history of measures designed to protect elephants and comparing CITES unfavorably with the United Nations Convention on Biological Diversity, which was convened in 1992).

²² See *id.* at 392.

²³ See *id.*

²⁴ See *id.*

²⁵ See generally *id.* at 392-95.

²⁶ See *infra* notes 186-211 and accompanying text.

pessimistic predictions, Africans can prosper given the opportunity and independence to address this type of difficult international issue.²⁷ Along these lines, the conclusion implicitly supports African self-determination, while warning against the proliferation of neo-colonial international agreements such as CITES.²⁸

I. AN INTRODUCTION TO THE CONVENTION

When CITES first was adopted, there was little world concern about regulating the ivory trade.²⁹ In fact, the UN initiated the negotiations that led to CITES primarily because of the fervent efforts of a few public interest non-governmental organizations (NGOs).³⁰ These NGOs believed customary international law, which arguably dictates that countries must protect endangered species,³¹ was not sufficient to ensure the animals' survival.³² After all, while customary international law is binding on all states, it is only effective to the extent it can be enforced.³³ Formal agreements tend to levy greater responsibility on

²⁷ See *infra* notes 218–28 and accompanying text.

²⁸ See *infra* notes 229–44 and accompanying text.

²⁹ See David S. Favre, *The Risk of Extinction: A Risk Analysis of the Endangered Species Act as Compared to CITES*, 6 N.Y.U. ENVTL. L.J. 341, 348 (1998) [hereinafter Favre, *Risk of Extinction*].

³⁰ See Phillippe J. Sands & Albert P. Bedecarre, *Convention on International Trade in Endangered Species: The Role of Public Interest Non-Governmental Organizations in Ensuring the Effective Enforcement of the Ivory Trade Ban*, 17 B.C. ENVTL. AFF. L. REV. 799, 800 (1990). The authors also point out that non-governmental organizations (NGOs) are allowed to and do participate in subsequent meetings of the member states. See *id.* at 801. CITES itself, in Article XI, allows any international or national NGO or other organization to participate at regular meetings unless at least one-third of the parties present object. CITES, *supra* note 7, art. XI, 27 U.S.T. at 1105. As a practical matter, of course, few countries will object to the World Wide Fund for Nature or the Humane Society participating in a conference about animals. CITES also allows the Secretariat to enlist NGO's in a variety of duties, such as field studies of animal populations and the efficacy of implementation measures. See *id.*, art. XII, 27 U.S.T. at 1106.

³¹ See Glennon, *supra* note 3, at 10, 29–30. Customary international law develops when a pattern of practice develops that gives rise to a sense of legal obligation on the part of states. See *id.* at 29–30. Glennon contends that international protection of endangered species is now so widely practiced and accepted that it has become customary international law. See *id.* Customary international law also binds states that do not necessarily agree with the custom, or did not exist while the custom developed. See *infra* note 33.

³² See Sands & Bedecarre, *supra* note 30, at 800.

³³ See Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 705 (1988). Customary international law is founded on the idea that all states should participate in making decisions about how to resolve global issues. See David M. Parks, *GATT and the Environment: Reconciling Liberal Trade Policies with Environmental Preservation*, 15 UCLA J. ENVTL. L. & POL'Y 151, 178 (1996/1997). Therefore, there are disciplinary problems which occur when new states are incorporated, like the Slovak Republic, or when states emerge independent after imperialism, such as Zimbabwe, into the international legal order. See COVEY T. OLIVER ET AL., *THE INTERNATIONAL LEGAL SYSTEM* 90–93 (4th ed. 1995).

signatories, and may also establish mechanisms through which disputes can be addressed.³⁴ Accordingly, international consensus of the type CITES seeks to codify tends to be the best way to preserve global resources.³⁵

When examining any multilateral treaty, it is essential to recognize the diversity of opinions held by the different parties; CITES is no different.³⁶ Thus, consensus was attainable only by creating a document to which all parties could subscribe.³⁷ It is beyond the scope of this book review to conduct an exhaustive review of CITES and its numerous provisions. By way of background, however, it is instructive to look at specific articles of the Convention.³⁸

The Convention's preamble declares that "peoples and states are and should be the best protectors of their own wild fauna and flora."³⁹ Though only hortatory, this statement is an essential part of the Convention; from the first, parties are reminded that the agreement does not seek to intrude into domestic affairs.⁴⁰

Also important in this regard is the fact that the Convention allows states to make reservations.⁴¹ Some international agreements do not let countries enter reservations, that is, opt out of specific portions of the agreement.⁴² This is the case, for instance, in the UN Convention on Genocide, the rationale being that principles enshrined in that agreement are so fundamental that states either accept them or not—there can be no middle ground.⁴³

³⁴ See Parks, *supra* note 33, at 155 (discussing obligations on signatories to the GATT).

³⁵ See *id.* at 178.

³⁶ See *id.* at 177.

³⁷ See *id.*; see also David Favre, *Debate Within the CITES Community: What Direction for the Future?*, 33 NAT. RESOURCES J. 875, 878 (1993) [hereinafter Favre, *Debate Within*] (reflecting on 20 years of CITES and exploring issues that must be considered in the future in order for the Convention to maintain effectiveness).

³⁸ See *infra* notes 39–88 and accompanying text.

³⁹ CITES, *supra* note 7, Preamble, 27 U.S.T. at 1090. The preamble basically reassures parties that their national sovereignty will not be compromised once they become parties to CITES. See *id.*; *infra* notes 40–42.

⁴⁰ See CITES, *supra* note 7, art. XIV, 27 U.S.T. at 1108–09. Article XIV of the Convention continues in this vein with an extensive disclaimer about the effect of the Treaty in light of existing national laws. See *id.*; Favre, *Debate Within*, *supra* note 37, at 891–92.

⁴¹ See CITES, *supra* note 7, art. XXIII, 27 U.S.T. at 1116.

⁴² See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]; see also Reservations to the Convention on Genocide (Advisory Opinion) *reprinted in* OLIVER ET AL., *supra* note 33, at 1007–11 [hereinafter Advisory Opinion] (opining that if reservations are allowed to the Genocide Treaty, the agreement will be emasculated entirely).

⁴³ See Advisory Opinion, *supra* note 42, at 1007–11.

CITES, by contrast, is founded on ideas not universally accepted.⁴⁴ In addition, the comprehensive treaty took so long to forge that it was worthwhile to get as many signatories as possible, even if some uniformity was sacrificed in the process.⁴⁵ Especially in global accords that regulate environmental problems, which may transcend national boundaries, state sovereignty must be guarded carefully.⁴⁶ In the case of CITES, for example, there is no easy answer as to who should exert sovereignty over the peripatetic elephant.⁴⁷ Thus, the sort of safeguards described above try to guarantee that CITES will be embraced by a broad array of nations.⁴⁸

Another important aspect of the Convention is its Appendix system.⁴⁹ All wildlife that CITES protects is listed on one of three Appendices.⁵⁰ While population statistics are an important part of deciding how species are listed, they are not the only criterion for determining what wildlife will be included in which Appendix.⁵¹ Because animals and plants are listed at the request of member states, a variety of political, economic and social factors figure into the final decision.⁵²

In addition, as illustrated by the debate over elephants, member states can request that species not naturally existing in their country nevertheless be listed on one of the Appendices.⁵³ This power seemingly undermines the Convention's language seeking to protect national sovereignty, for it gives any member state the capacity to minimize another party's ability to govern its own wildlife.⁵⁴ In sum, the choice of which species should be listed on what Appendix is not as

⁴⁴ For example, the Southern African countries hardly think it is appropriate for foreigners to act in a way that regulates the trade in ivory. See *Botswana Offers Compromise Ivory Proposal*, Agence France-Presse, June 5, 1997, available in 1997 WL 2128082 [hereinafter *Botswana Offers Compromise*].

⁴⁵ See Sands & Bedecarre, *supra* note 30, at 800-01, 805; see also Favre, *Debate Within*, *supra* note 37, at 891-92 (discussing the fact that states do relinquish sovereignty when becoming parties to CITES, an exercise not undertaken lightly).

⁴⁶ See ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 1183-84 (2d ed. 1998).

⁴⁷ See Favre, *Debate Within*, *supra* note 37, at 891-92.

⁴⁸ See PLATER ET AL., *supra* note 46, at 1204.

⁴⁹ See CITES, *supra* note 7, art. II, 27 U.S.T. at 1092.

⁵⁰ See *id.* at apps. I, II, 27 U.S.T. at 1118-43. For the purposes of this book review, only Appendix I and II will be discussed. See *id.*

⁵¹ See Favre, *Risk of Extinction*, *supra* note 29, at 357.

⁵² See *id.*

⁵³ See CITES, *supra* note 7, art. XI, 27 U.S.T. at 1105.

⁵⁴ See *id.*

easy as it appears and thus, final determinations may not comport exactly with the severity of a species' condition.⁵⁵

Appendix I includes all species "threatened with extinction."⁵⁶ Thus, trade in products derived from wildlife listed in Appendix I is not allowed, save in "exceptional circumstances."⁵⁷ To this end, there are exceedingly stringent requirements that must be met before trade is permitted.⁵⁸ Under the terms of the recent ivory ban, elephants were listed on Appendix I, though at present they have been moved back to Appendix II, upon which they were designated originally.⁵⁹

Trade in products from wildlife listed on Appendix II also is strictly controlled, though less tightly than Appendix I mandates.⁶⁰ Species listed on Appendix II are not threatened immediately, but could face extinction if trade is not regulated closely.⁶¹ For instance, individuals can engage in trade governed by Appendix II only if they apply to their national government for a special permit.⁶² The permit is conditioned upon that government's determination that allowing a limited amount of trade will not impede the survival of the species.⁶³

The Convention also requires parties to provide periodic reports to the Secretariat,⁶⁴ penalize violators,⁶⁵ and take measures to enforce the Convention.⁶⁶ Like many other international agreements, however, CITES does not mandate *specific* enforcement mechanisms.⁶⁷ For in-

⁵⁵ See Favre, *Risk of Extinction*, *supra* note 29, at 357. It is easy to envision an American politician, trying to earn political capital with the public, posing himself as the defender of wildlife by proposing that trade in elephant products be tightly restricted. See Glennon, *supra* note 3, at 14-15. In fact, it is a no-lose situation: 1) most people support actions designed to help elephants, and 2) the politician is not accountable domestically for the decision because it will have so little direct effect on the country. See *id.*

⁵⁶ CITES, *supra* note 7, art. II, 27 U.S.T. at 1092.

⁵⁷ *Id.* The reasoning behind this exceedingly restrictive category is that the signers believe the well-being of the particular species may be affected by trade. See *id.*

⁵⁸ See *id.*

⁵⁹ See *Wildlife* (visited Oct. 11, 1998) <<http://www.sadcreview.com/wildlife.html>> [hereinafter *Wildlife*] (coordinated by Malawi for the Southern African Development Community (SADC) Review).

⁶⁰ See CITES, *supra* note 7, art. IV, 27 U.S.T. at 1095; *id.* art. III, 27 U.S.T. at 1093-94.

⁶¹ See *id.* art. II, 27 U.S.T. at 1092.

⁶² See *id.* art. IV, 27 U.S.T. at 1095-96.

⁶³ See *id.*

⁶⁴ See *id.* art. VIII, 27 U.S.T. at 1103. The reports are supposed to include a list of how many trading permits were given out, the reasons the permits were awarded, and all measures taken to ensure the survival of the species. See *id.*

⁶⁵ See CITES, *supra* note 7, art. VIII, 27 U.S.T. at 1101.

⁶⁶ See *id.*

⁶⁷ See *id.*

stance, if the Secretariat believes a member state is failing to comply with CITES guidelines, it may inform the state that it is violating the agreement.⁶⁸ Yet the only explicit requirement on the part of the respondent is to answer the complaint.⁶⁹

Because of such weak enforcement mechanisms, the United States and other Western countries have passed domestic legislation targeting the perceived problems of the ivory trade.⁷⁰ This kind of legislation is troublesome because the people most affected by the regulations do not live in the country implementing the regulations.⁷¹ These laws therefore usurp sovereignty from other states, albeit indirectly, by deciding how these countries can use their resources.⁷²

It was in this vein that Western nations spearheaded the movement at COP7 to upgrade elephants from Appendix II to the more restrictive Appendix I.⁷³ Southern African nations objected to the alteration, but the elephant was re-assigned nonetheless.⁷⁴ Because amendments can be adopted by a two-thirds majority,⁷⁵ Western member states were able to overcome African protestations.⁷⁶ Probably because the majority necessary to ratify amendments is relatively low, amendments are only binding on parties who expressly accede to them.⁷⁷ Botswana and Zimbabwe entered reservations to the ban, indicating when they did so that the ban conflicted with their national interests.⁷⁸

⁶⁸ See *id.* art. XIII, 27 U.S.T. at 1107.

⁶⁹ See *id.* This apparent impotence is symptomatic of many international agreements primarily designed to gain as many signatories as possible. See Advisory Opinion, *supra* note 42, at 1007-11. An example of this is the Genocide Convention. See Genocide Convention, *supra* note 42, 78 U.N.T.S. at 277.

⁷⁰ In October 1988, the U.S. enacted the African Elephant Conservation Act, which created an almost absolute ban on the import of elephant ivory. 16 U.S.C. §§ 4201-45 (1998).

⁷¹ See Parks, *supra* note 33, at 171. But see Patti A. Goldman, *Resolving the Trade and Environment Debate: In Search of a Neutral Forum and Neutral Principles*, 49 WASH. & LEE L. REV. 1279, 1293 (1992) (arguing that because CITES and other such agreements lack strong enforcement mechanism, "[e]xtraterritorial regulation is . . . critical in protecting endangered and threatened species").

⁷² See Storey, *supra* note 21, at 377; Dunoff, *supra* note 10, at 1424.

⁷³ See Favre, *Debate Within*, *supra* note 37, at 877.

⁷⁴ See *id.*

⁷⁵ See CITES, *supra* note 7, art. XV, 27 U.S.T. at 1110.

⁷⁶ The move towards the ban had begun at earlier COP meetings. See Importation, *supra* note 5, at 19417. In 1981 and 1985, the parties enacted additional measures to regulate the trade in ivory more stringently. See *id.*

⁷⁷ See CITES, *supra* note 7, arts. XV-XVII, at 1110-14.

⁷⁸ See Favre, *Debate Within*, *supra* note 37, at 877. While reservations weaken the potency of the Convention, they may make the agreement more palatable to governments which like knowing that they can choose not to accede to certain portions of the agreement. See CITES, *supra* note 7, art. XXIII, 27 U.S.T. at 1116; Sands & Bedecarre, *supra* note 30, at 805. Namibia

Nonetheless, these countries, and Namibia when it became a party to the Convention, generally abided by the ban.⁷⁹ Although CITES' formal enforcement mechanisms are weak, parties can capitalize on consensus, such as that achieved during the amendment process, to mobilize international opinion against parties that do not agree to certain principles.⁸⁰ The possibility of this type of backlash is an effective way to discourage violations of the ban.⁸¹

It is clear that CITES provides a framework within which to address the problems of threatened species.⁸² In this regard, it creates a useful forum in which national governments and NGOs can voice concerns about particular wildlife or country practices.⁸³ The Convention's weakness lies in how easily it can be subverted.⁸⁴ For one, it lacks formal enforcement mechanisms, so violations are difficult to curb.⁸⁵ In addition, it is not insulated effectively from capricious, political decisions about how to categorize different species.⁸⁶ While it did help reduce the price of ivory, at least in the short-term, CITES by itself has done little to curb interest in ivory.⁸⁷ Most importantly, it has failed to unite Western states with the southern African countries that have the most at stake in the ivory trade.⁸⁸

II. THE HISTORY OF THE IVORY BAN

Working from the premise that CITES by itself is not enough, the question becomes how the international community best can protect elephants.⁸⁹ Even accepting the argument that the ivory ban enacted

did not become a party to the Convention until 1991. See Favre, *Debate Within*, *supra* note 37, at 877 n.11.

⁷⁹ See *Whose Elephants Are They Anyway?*, *ECONOMIST*, Nov. 5, 1994, at 46 [hereinafter *Whose Elephants*].

⁸⁰ See David A. Martin, *How Rhetoric Became Rights*, *WASH. POST*, Nov. 1, 1998, at C2 (describing how the Universal Declaration on Human Rights developed from a mere hortatory statement into an international obligation).

⁸¹ See *id.*

⁸² See generally Sands & Bedecarre, *supra* note 30, at 800-05.

⁸³ See *id.*

⁸⁴ See *infra* notes 85-86.

⁸⁵ See CITES, *supra* note 7, art. XIII, 27 U.S.T. at 1107.

⁸⁶ See Favre, *Risk of Extinction*, *supra* note 29, at 357.

⁸⁷ See Storey, *supra* note 21, at 375-77.

⁸⁸ See Favre, *Debate Within*, *supra* note 37, at 877.

⁸⁹ See Storey, *supra* note 21, at 396; see also *New Ways to Run the World*, *ECONOMIST*, Nov. 9, 1991, at 11 [hereinafter *New Ways*] (discussing the difficulty of dealing with environmental degradation in countries which do not share, necessarily, Western ideas about wildlife preservation).

under CITES was an effective way to protect elephant populations, it nonetheless proved a poor paradigm through which to establish healthy, sustainable relationships between elephants, the environment and the nations in which the creatures dwell.⁹⁰

This problem has been a persistent predicament for southern Africa since independence.⁹¹ Trying to establish their own autonomy, but also relying on Western assistance, these states have struggled to placate all stakeholders.⁹² As Casto's book points out, "[t]he bidding war . . . over spheres of influence became a serious handicap to the rational development of sub-Saharan Africa."⁹³ This battle is apparent in the debate about elephant preservation, for Western suggestions are influential, but not always reasonable.⁹⁴

The fact is that ivory is highly sought-after.⁹⁵ Elephant hunting, and the subsequent trade in ivory, can be exceedingly lucrative, especially in underdeveloped areas where elephants tend to live.⁹⁶ The money to be made from trading even a modicum of ivory greatly outweighs the average salary most Africans earn during the course of a year.⁹⁷ In this economically deprived environment, it is not surprising that poaching, with or without the existence of a ban, is a common occurrence.⁹⁸

Despite this reality, the United States led the way towards a total ban, hailing it as the only solution to burgeoning totals of elephant deaths.⁹⁹ Great Britain and France soon followed the American lead,¹⁰⁰ as did the European Community on the whole.¹⁰¹

Interestingly, the call for a ban was echoed by a number of African countries, including Kenya.¹⁰² Though a sizable number of elephants

⁹⁰ See Storey, *supra* note 21, at 396-97.

⁹¹ See CASTO, *supra* note 13, at 265.

⁹² See *id.*

⁹³ *Id.*

⁹⁴ See Storey, *supra* note 21, at 396-98.

⁹⁵ See Glennon, *supra* note 3, at 20.

⁹⁶ See Storey, *supra* note 21, at 378.

⁹⁷ See *id.*

⁹⁸ See *id.*

⁹⁹ See U.S., *Trying to Protect Elephants, Declares Ban on All Ivory Imports*, N.Y. TIMES, June 7, 1989, at A18.

¹⁰⁰ See *European Community Bans Import of Ivory*, N.Y. TIMES, June 11, 1989, at A21.

¹⁰¹ See Commission Regulation 2496/89 of 2 August 1989 on a Prohibition on Importing Raw and Worked Ivory Derived from the African Elephant into the Community, 1989 O.J. (L 240) 5, 5. As the regulation stated, "most ivory is traded outside [the ivory quota] system and illegal and excessive taking of elephants continues to take place at unsustainable levels." *Id.*

¹⁰² See Glennon, *supra* note 3, at 15-16. One likely reason Kenya supported the trade ban is

still reside in Kenya, the country's elephant population has been ravaged by poachers.¹⁰³ In fact, in a 1989 demonstration against the ivory trade, Kenyan President Daniel arap Moi burned stock-piles of ivory valued at several million dollars.¹⁰⁴

The terse ideological conflict described in Casto's book¹⁰⁵ was given shape when the ivory ban was approved, in 1989, over objections and reservations of southern African nations.¹⁰⁶ Initially, the ban worked almost too well.¹⁰⁷ The price of ivory dropped significantly, which, in turn, made trading and marketing less lucrative.¹⁰⁸ Elephant populations increased across Southern Africa, after falling during the previous fifteen years.¹⁰⁹ In some cases the resurgence was actually too great for the land to sustain.¹¹⁰

After this initial decline in ivory prices, however, prices rose again towards pre-ban levels.¹¹¹ By the 1994 Conference of the Parties (COP9), Botswana, Namibia and Zimbabwe were threatening to ignore CITES and resume trading ivory to fund elephant conservation projects.¹¹² Considering that these nations had entered reservations to the original ban, this threat easily, and legally, could have been carried out.¹¹³ In the end, they chose to comply with CITES, but did not abandon their desire to end the ban.¹¹⁴

because, unlike southern African countries which have had minimal trouble with poachers, Kenya has experienced significant problems with poaching. *See id.*; Storey, *supra* note 21, at 379. Evidence suggests poachers began in the northern part of the continent, then slowly proceeded south. *See* Storey, *supra* note 21, at 379. Furthermore, vast, unpopulated expanses of land in nations like Kenya make it difficult for countries to police their territory. *See* Editorial, *Act on Renewed Poaching Threat*, DAILY NATION (Nairobi), Feb. 17, 1998 [hereinafter *Renewed Poaching Threat*].

¹⁰³ *See* Storey, *supra* note 21, at 379–80.

¹⁰⁴ *See* Andrew J. Heimert, *How the Elephant Lost His Tusks*, 104 YALE L.J. 1473, 1486 (1995).

¹⁰⁵ *See* CASTO, *supra* note 13, at 265.

¹⁰⁶ *See* Sands & Bedecarre, *supra* note 30, at 799–800.

¹⁰⁷ *See* *The Ivory Paradox: Killing the Trade in Tusks Could Wipe out the Elephant, Too*, ECONOMIST, Mar. 2, 1991, at 16 [hereinafter *Ivory Paradox*]; Storey, *supra* note 21, at 375–76.

¹⁰⁸ *See* Storey, *supra* note 21, at 376.

¹⁰⁹ *See* Importation, *supra* note 5, at 19417; *Sustaining the Elephant: Easing the Ban on Ivory Sales Is Worth Trying*, SACRAMENTO BEE (California), June 26, 1997, at B6 [hereinafter *Sustaining the Elephant*].

¹¹⁰ *See* *Sustaining the Elephant*, *supra* note 109. Because of these growing populations, elephants have caused human, agricultural and property damages. *See id.*

¹¹¹ *See* *Namibia CITES Factsheet* (visited Sept. 22, 1998) <http://www.wildnetafrica.co.za/cites/info/135_011_namibiafacts.html> [hereinafter *Namibia Factsheet*].

¹¹² *See* *Whose Elephants*, *supra* note 79, at 46.

¹¹³ *See* CITES, *supra* note 7, art. XV, 27 U.S.T. at 1110.

¹¹⁴ *See* *Sustaining the Elephant*, *supra* note 109. The ethical problem with CITES is that it looks suspiciously like imperialism. *See* *New Ways*, *supra* note 89, at 11; Keith Aoki, *Neocolonialism, Anticommons Property, and Biopiracy in the (Not-So-Brave) New World Order of International Intel-*

With African leaders bemoaning what they viewed as neo-imperialism, and Western activists contending that African officials already were involved in illicit ivory trading, the stage was set for the 1997 Conference of the Parties (COP10).¹¹⁵ Prior to the meeting, Botswana, joined by Namibia and Zimbabwe, had proposed a one-time sale, to one customer, of stock-piled ivory.¹¹⁶ These countries argued that, having managed their elephants effectively, they should be rewarded.¹¹⁷ They also suggested that substantial revenue to be gained from a one-time sale could be pumped back into elephant conservation programs.¹¹⁸ To allay Western skepticism, Botswana's government promised the country would only sell ivory which had already been collected from elephants that had attacked villagers.¹¹⁹

Despite Western objections, CITES member states voted to lift the ivory ban.¹²⁰ Since then, interested parties have carefully followed reports of poaching.¹²¹ In Kenya, for instance, recent elephant deaths have some observers worried that poachers once again are on the

lectual Property Protection, 6 IND. J. GLOBAL LEGAL STUD. 11, 20-21 (1998) [hereinafter Aoki, *Neocolonialism*] (discussing particularly the field of intellectual property and strategies employed by developed nations that effectively coerce developing states to adhere to Western norms); see also *Turtle Soup*, ECONOMIST, Oct. 17, 1998, at 88 (discussing need to balance measures aimed at protecting endangered species with the necessity of engaging in fair trade practices).

¹¹⁵ See *Sustaining the Elephant*, *supra* note 109. Ironically, COP10 took place in Harare, the capital of Zimbabwe. See Emmanuel Koro, *Zimbabwe: Early Calls to Reverse CITES Decision on Elephants*, INTER PRESS SERVICE, Jan. 19, 1998, available in 1998 WL 5985401.

¹¹⁶ See *Botswana Offers Compromise*, *supra* note 44. About a year prior to the Conference, the Southern African Development Community (SADC), of which Botswana is a member, had issued a declaration in which it supported Botswana's proposal, now joined by Namibia and Zimbabwe. See *Resolution on a SADC Common Position on the African Elephant for CITES COP10* (visited Sept. 22, 1998) <http://wildnetafrica.co.za/cites/info/iss_017_sadc.html>. The resolution acknowledged the need to preserve the elephant as a valuable world resource and the importance of sustainable development, but it also emphasized the right of SADC members to derive benefits from responsible utilization of their national resources. See *id.* To this end, the resolution supported altering the elephant's status from Appendix I to Appendix II and exploring ways to take advantage of stock-piled ivory. See *id.* This highlights the central debate between Western and African governments; in the eyes of Africans elephants are a resource while Westerners view them as the world's possession. See *Whose Elephants*, *supra* note 79, at 46.

¹¹⁷ See *Botswana Offers Compromise*, *supra* note 44.

¹¹⁸ See *id.*

¹¹⁹ See *id.*

¹²⁰ See *Restrictions on Ivory Trade Eased*, FRESNO BEE (California), June 20, 1997, at A14 [hereinafter *Ivory Trade Eased*]. Interestingly, nearly 75% of member states agreed with Botswana that the ban should be eased. See *id.*

¹²¹ See *Renewed Poaching Threat*, *supra* note 102; *Kenya Elephant Poaching Rising After Ban Lifted*, ROCKY MOUNTAIN NEWS (Denver), July 28, 1998, at 30A [hereinafter *Poaching Rising*]; *Elephant Poaching on Rise, Says Group*, ST. LOUIS POST-DISPATCH, Nov. 7, 1997, at B8.

prowl in search of tusks.¹²² Conversely, most southern African countries believe increased reports of poaching are fabricated and are intended only as a way to ignite animal activists' emotions.¹²³

The debate continues. Animal rights groups highlight the fact that, in contrast to Southern Africa Development Community (SADC) members who proposed lifting the ban, the other twenty-eight African nations which are parties to CITES support the ban.¹²⁴ While true, this argument is somewhat disingenuous: first, some of these twenty-eight nations, such as Kenya and Sudan, wanted to get involved in the trade of ivory in 1994; second, none of these other states have the type of elephant populations that roam southern Africa and, thus, are not as directly affected by the ban.¹²⁵

Activists also claim that local populations are harmed more than helped by the ivory trade.¹²⁶ Yet this, too, is misleading.¹²⁷ Unquestionably, the ivory trade traditionally has been unregulated and chaotic.¹²⁸ Substantial money has been earned by poachers, while little benefit has accrued in local communities.¹²⁹ The more systematic approach adopted at COP10 inverts this situation—governments maintain control of revenues gained from ivory so that local communities can benefit from the trade.¹³⁰ In addition, this approach creates a more equitable way of distributing power within CITES.¹³¹

¹²² See *Poaching Rising*, *supra* note 121. The situation in Kenya is particularly difficult because of the size of the country and the inaccessibility of many areas inhabited by elephants. See *Renewed Poaching Threat*, *supra* note 102.

¹²³ See Koro, *supra* note 115.

¹²⁴ See generally *The Case Against Commercial Trade in Elephant Products* (visited September 22, 1998) <http://www/wildnetafrica.co.za/cites/info/iss_007_elearguments.html> [hereinafter *Case Against Commercial Trade*].

¹²⁵ See *id.* Because poachers apparently began in the northern part of the continent and moved south, northern African countries which support CITES differ in perspective from the southern African countries that comprise SADC. See *id.*

¹²⁶ See *id.*

¹²⁷ See *id.*

¹²⁸ See *id.*

¹²⁹ See *Case Against Commercial Trade*, *supra* note 124.

¹³⁰ See *Namibia Factsheet*, *supra* note 111.

¹³¹ See Keith Aoki, *Considering Multiple and Overlapping Sovereignities: Liberalism, Libertarianism, National Sovereignty, "Global" Intellectual Property, and the Internet*, 5 IND. J. GLOBAL LEGAL STUD. 443, 465 (1998) (discussing the need to allocate power between north and south more evenly in international intellectual property agreements). Though every member's vote is equal, international agreements such as CITES tend to show a marked bias toward the interests of the Western parties. See *id.* The continuing reliance of the developing world on the West, namely the U.S. and Europe, enables Western parties to use trade restrictions to acquire what they want through coercion. See Editorial, *Rich Men's Rules*, FIN. TIMES (London), Feb. 18, 1999, at 15. Another justification for lifting this ban is exemplified in this type of behavior. See *Shortcomings*

Easing or lifting the ban is risky, but it is a risk worth taking.¹³² The danger is also being minimized by the limited, careful way in which the ban is being eased.¹³³ Because of these limits, it is unlikely that the ivory trade will develop into a race to the bottom.¹³⁴ If there is a resurgence of poaching and elephant slaughter, the experiment can be ended.¹³⁵

III. METHODS OF MANAGING ELEPHANTS

The re-introduction of the ivory trade is a positive step forward in the attempt to create an environment in which elephants and humans can co-exist peacefully. In contrast to the ban, a strictly-controlled ivory trade provides an effective way for nations to benefit from elephants, which are, after all, a national resource.¹³⁶ Perhaps even more importantly, the revocation of the ban serves as a reminder to the West that their policies are not always appropriate in Africa.¹³⁷ In the past, as Casto acknowledges, the West has taken little responsibility for failed efforts to bring positive management to Africa.¹³⁸ A successfully operated elephant ivory trade may force the West to recognize the inadequacy of its earlier responses to the situation.¹³⁹

Yet the trade will work, and revenue generated from elephants will multiply, only if elephant populations are sustained responsibly.¹⁴⁰ These are massive creatures, so managing them is exceedingly difficult.¹⁴¹ Because of population pressures, elephant terrain increasingly includes human habitats.¹⁴² As a result, elephants cause extensive inju-

Involving CITES (visited Sept. 21, 1998) <http://ps.ucdavis.edu/classes/pol122/UGA/mindiv.html>.

¹³² See *Sustaining the Elephant*, *supra* note 109.

¹³³ See *id.*; see also *Ivory Trade Ban is Eased*, FIN. TIMES (London), Feb. 11, 1999, at 7 (reporting that ban was eased to help generate funds for community development projects).

¹³⁴ See *Ivory Trade Eased*, *supra* note 120.

¹³⁵ See *Sustaining the Elephant*, *supra* note 109. One development that should enable the ivory trade to be more transparent is technology which gives different types of ivory a distinctive "signature." See *Poached? Moi?*, ECONOMIST, Oct. 13, 1990, at 92. In addition, states are improving internal monitoring methods, both in terms of managing their own ivory products, and ensuring that ivory they have exported was obtained legally. See Storey, *supra* note 21, at 386-87.

¹³⁶ See *supra* Part II.

¹³⁷ See CASTO, *supra* note 13, at 270.

¹³⁸ See *id.*

¹³⁹ See *id.*

¹⁴⁰ See *Sustaining the Elephant*, *supra* note 109.

¹⁴¹ See Tracey C. Rembert, *Opening the Ivory Door*, EARTH ACTION NETWORK NEWSLETTER (Earth Action Network, Inc.), July 1, 1998, available in 1998 WL 16883687; *Poaching Rising*, *supra* note 121.

¹⁴² See *id.* This situation is not unlike those in other parts of the world where animals and

ries to humans, property and crops each year.¹⁴³ In Namibia, for instance, less than one percent of the country receives enough rain each year to sustain agriculture.¹⁴⁴ Only a few areas in the country, therefore, can support wildlife, people and crops.¹⁴⁵

African states seem to recognize the value of preservation—they have signed conservation treaties, initiated conservation programs, and developed eco-tourism projects.¹⁴⁶ The more pressing question is whether the African *people* who share habitat with elephants realize the importance of preservation.¹⁴⁷ Most policy-makers agree that the only way to relieve the strain between humans and elephants is to convince local people that preserving elephants is economically beneficial.¹⁴⁸

There are a number of ideas about how best to pursue a sustainable program of elephant preservation.¹⁴⁹ The four primary methods are discussed below.¹⁵⁰

humans have trouble co-existing. See *The Question Rio Forgets*, *ECONOMIST*, May 30, 1992, at 11 (detailing global population pressures).

¹⁴³ See Rembert, *supra* note 141. Land distribution is a troubling issue throughout Africa because most fertile land was extricated from African control by colonial leaders. See J. Oloka-Onyango, *Beyond the Rhetoric: Reinventing the Struggle for Economic and Social Rights in Africa*, 26 CAL. W. INT'L L.J. 1, 40 (1995). It is beyond the scope of this Note to try and explicate, or make suggestions about how to rectify, African land ownership problems. Suffice it to say here that parsimonious colonial rulers were not particularly generous to Africans when dividing up land. See *Reform in Year Two; South Africa's President De Klerk Must Resist the Temptation to Bypass the Disorganised ANC*, *ECONOMIST*, Jan. 26, 1991, at 14 (highlighting the fact that Africans traditionally have been excluded from most land in South Africa); see also Gordon, *supra* note 12, at 907 n.12, 909 (exploring the effects of colonial occupation on African societies and economies).

¹⁴⁴ See CASTO, *supra* note 13, at 137. Namibia is about twice the size of California. *Id.*

¹⁴⁵ See *id.*

¹⁴⁶ See Rembert, *supra* note 141 (discussing measures taken by Zimbabwe); see also Heimert, *supra* note 104, at 1486–88 (detailing Kenyan efforts to preserve elephant populations).

¹⁴⁷ See Storey, *supra* note 21, at 390. Unfortunately, Western groups frequently devise policies and regulations without taking account of the applicability of their ideas in a foreign context. See Oloka-Onyango, *supra* note 143, at 60–62. This is not just a problem in Africa; for instance, in Colombia, the U.S. has placed enormous pressure on the government to continue with a program designed to eradicate illegal plants used in the manufacture of drugs. See Vanessa Diago Garcia, *Innocent Victims of War in the Air*, World Wide Fund for Nature Features (visited Oct. 2, 1998) <<http://www.panda.org/news/features/story.cfm?id=113>>. Though existing herbicides have been shown to harm people, crops and the environment, the U.S. wants herbicidal spraying to continue with even stronger chemicals. See *id.*

¹⁴⁸ See Don L. Coursey, *The Revealed Demand for a Public Good: Evidence from Endangered and Threatened Species*, 6 N.Y.U. ENVTL. L.J. 411, 412 (1998). Coursey's logical argument points out that animals are not susceptible to protection from all parties unless some type of monetary incentive is included in the bargain. See *id.*

¹⁴⁹ See Storey, *supra* note 21, at 381–95. Sustainability is rooted in the importance of using resources responsibly, and in a manner that will preserve them effectively. See *Wildlife*, *supra* note 59.

¹⁵⁰ See Rembert, *supra* note 141; Storey, *supra* note 21, at 381–88; *infra* Part III at §§ A-D.

A. Fencing

Some governments protect sought-after animals by erecting fences around animal habitats, as is done in national parks, for example.¹⁵¹ The Kenya Wildlife Service (KWS) is a leader in this effort, having created a number of enclosed areas in which to maintain elephants as well as other threatened species like rhinoceroses.¹⁵² Fencing is effective because it segregates these animals from humans while limiting the area that rangers must patrol.¹⁵³ In addition, fencing may benefit eco-tourism companies because it increases the chance that high-paying sightseers will be able to view the big game animals they are paying to see.¹⁵⁴

One drawback to fencing is its cost.¹⁵⁵ Even if that hurdle can be overcome, fencing diminishes animals' freedom of movement, an essential part of their, and the environment's, survival.¹⁵⁶ When local populations are separated from one another, as can occur with fencing, the animals tend to inbreed, an activity that decreases the survival rate of the species.¹⁵⁷ Moreover, when animals are not allowed to disperse over their natural, broad territory, the damage they inflict on the land is greater.¹⁵⁸ While fencing may be useful for protecting some endangered species, it is not practical as a means to preserve the corpulent elephant.¹⁵⁹

¹⁵¹ See Storey, *supra* note 21, at 383-84.

¹⁵² See *id.*

¹⁵³ See *id.* Because Kenya's elephant population is smaller than those of other African countries, the country understandably is concerned with preserving its existing population. See *id.* at 379.

¹⁵⁴ See Heimert, *supra* note 104, at 1497 (implying that Kenya relies on tourism as its primary means of benefitting from elephants).

¹⁵⁵ See *id.* at 1487.

¹⁵⁶ See *Road Kill*, *ECONOMIST*, Sept. 26, 1998, at 82 [hereinafter *Road Kill*]. As one authority points out, degradation of animal habitat is probably the main cause of animal extinction, more destructive than even hunting. See PLATER ET AL., *supra* note 46, at 673.

¹⁵⁷ See *Road Kill*, *supra* note 156, at 82.

¹⁵⁸ See *id.*

¹⁵⁹ See Storey, *supra* note 21, at 383-84; see also Glennon, *supra* note 3, at 1 (citing CYNTHIA MOSS, *ELEPHANT MEMORIES: THIRTEEN YEARS IN THE LIFE OF AN ELEPHANT FAMILY* 103, 123 (1988) (stating that elephants grow for their entire life, and eat approximately 300 pounds of food per day)).

B. *Eco-Tourism*

Eco-tourism actually includes two concepts: 1) game-viewing safaris¹⁶⁰ and 2) big-game hunting.¹⁶¹ The first of these, game-viewing, is promoted as a way to generate significant revenues from elephants without having to exterminate them.¹⁶² Unfortunately, game-viewing is not always an option for African nations because of the rugged terrain in which wildlife often dwells.¹⁶³ Poor infrastructure frequently makes it difficult to access areas distant from national capitals.¹⁶⁴ In addition, companies that stage safaris usually are based in cities and, thus, have little or no connection with local communities.¹⁶⁵

Big-game hunting is not legal in all countries, but where allowed it can be lucrative, for the permits required to hunt game are expensive.¹⁶⁶ Like game-viewing, however, hunting generally does not greatly benefit local communities.¹⁶⁷ Many companies are run by foreigners, and so revenue may bypass local coffers.¹⁶⁸

Eco-tourism is valuable as a way to bring substantial revenue, especially in the form of hard, foreign currency, into the country.¹⁶⁹ In addition, it is an effective way to publicize the plight of elephants.¹⁷⁰

¹⁶⁰ "Safari" is the Swahili word for trip. See MARTIN BENJAMIN ET AL., *SWAHILI PHRASEBOOK* 215 (2d ed. 1998).

¹⁶¹ See Favre, *Risk of Extinction*, *supra* note 29, at 354, 362 (discussing Malawi and its sports-hunting industry).

¹⁶² See Glennon, *supra* note 3, at 9 n.67; *Killing to Be Kind: Why we Ought to Hunt Big Animals*, *ECONOMIST*, Apr. 20, 1996, at 76 [hereinafter *Killing to Be Kind*].

¹⁶³ See Anita Manning, *A Call for Changes in Conservation Efforts*, *USA TODAY*, May 18, 1993, at 4D (interview with Raymond Bonner); Storey, *supra* note 21, at 393.

¹⁶⁴ See MICHAEL BARRATT BROWN, *AFRICA'S CHOICES: AFTER THIRTY YEARS OF THE WORLD BANK* 233 (1995) (stating that because of corruption and the rise of the informal sector, African states have been unable to provide even the most basic resources which nascent enterprises need to flourish).

¹⁶⁵ See Christof Maletsky, *Namibia; Regional 'Spin' for Tourism*, *NAMIBIAN* (Windhoek), Aug. 14, 1998, available in Lexis, News Library, News Group File.

¹⁶⁶ See *Killing to Be Kind*, *supra* note 162, at 76.

¹⁶⁷ See *id.* (stating that many hunters take pains to avoid the people and cultures of the locales in which they hunt); see also Rembert, *supra* note 141 (noting that a number of families in Zimbabwe have been displaced by hunting ventures).

¹⁶⁸ See Rob Taylor, *Kilimanjaro Park's Plan Serves as Model of New Approaches to Conservationism*, *SEATTLE POST-INTELLIGENCER*, Oct. 23, 1997, at D1 (depicting Masai tribesmen's view that tourists are "cattle" from the cities and abroad); see also *A New Scramble*, *ECONOMIST*, Aug. 12, 1995, at 17 (discussing the efforts of South African whites to expand operations into the rest of Africa).

¹⁶⁹ See *Killing to Be Kind*, *supra* note 162, at 76.

¹⁷⁰ See Willis, *supra* note 3 (describing computer link used to track elephant populations in Cameroon).

Eco-tourism is, therefore, an important resource upon which southern African countries must continue to capitalize.¹⁷¹

By the same token, its strength is its weakness; that is, eco-tourism relies too heavily on foreigners.¹⁷² Safaris are so costly that most Africans can not afford them.¹⁷³ While eco-tourism is profitable, it generally does not benefit local communities and thereby lacks the ability to engage them meaningfully in the conservation process.¹⁷⁴

C. CAMPFIRE

The Communal Areas Management Program for Indigenous Resources (CAMPFIRE) was launched in Zimbabwe in 1989.¹⁷⁵ Initiated as a response to poaching, the program lets local communities decide how to manage elephant populations in their area.¹⁷⁶ Revenue usually is earned through the sale of hunting permits.¹⁷⁷ This money then is injected back into the community to build schools and roads, and to further educate people about managing elephants effectively.¹⁷⁸ Because CAMPFIRE gives locals a vested interest in the sustainability of the elephant population, a number of conservation groups support the program.¹⁷⁹

CAMPFIRE is flawed, however, in that its benefits are not distributed universally.¹⁸⁰ Some communities have profited, but others have not.¹⁸¹ Though under CAMPFIRE local communities may control hunting permits, trophy-hunting operations control the flow of hunters.¹⁸²

¹⁷¹ See *Killing to Be Kind*, *supra* note 162, at 76.

¹⁷² See *id.* (highlighting the fact that most tourists are foreign); see also *Meet Max, a 190-kilo Crimebuster*, *ECONOMIST*, July 11, 1998, at 83 [hereinafter *Meet Max*] ("The luxurious game lodges in Botswana's Okavango delta . . . generally have no local customers at all. The average Kenyan does not earn in a week what elderly Europeans on a balloon safari over the Masai Mara spend on tumblers of whisky at sundown.").

¹⁷³ See *Meet Max*, *supra* note 172, at 83. As the article points out, "[s]afari holidays are wonderful, but they are beyond the means of most Africans." *Id.* By contrast, zoos are inexpensive and easily accessible for the numerous Africans who live in cities. See *id.*

¹⁷⁴ See Taylor, *supra* note 168.

¹⁷⁵ See Rembert, *supra* note 141.

¹⁷⁶ See *id.* Since CAMPFIRE was begun, Zimbabwe's elephant population has nearly doubled, while illegal poaching has been reduced drastically. See *id.*

¹⁷⁷ See *id.*

¹⁷⁸ See *id.*

¹⁷⁹ See *id.*

¹⁸⁰ See Rembert, *supra* note 141.

¹⁸¹ See *id.*

¹⁸² See *id.*

As a result, a number of villages have been razed in favor of hunting lodges.¹⁸³

Paradoxically, CAMPFIRE may devolve too much power to local communities, thereby weakening the national government's ability to control elephant populations.¹⁸⁴ Programs such as CAMPFIRE are well-intended and can work effectively, but only if regulated in a manner that guarantees all communities affected by elephants benefit equally.¹⁸⁵

D. *Culling*

CAMPFIRE, in essence, is an indirect method of managing animals through culling.¹⁸⁶ While the ethical ramifications of deciding to kill elephants are troubling,¹⁸⁷ government-controlled culling nonetheless provides the best method by which to benefit from the sale of ivory, control population numbers and ensure the elephant's continued existence.¹⁸⁸

Notwithstanding concerns about state corruption, there are several reasons to be optimistic about culling.¹⁸⁹ First, it is lucrative.¹⁹⁰ Selling ivory acquired from culling elephants will provide needed resources that can be used to build up local communities and national wildlife ranger forces.¹⁹¹ As opposed to CAMPFIRE, where money only accumulates in specific local communities, revenue earned from culling will go to the national government, which can ensure it will be spent where most needed.¹⁹² Because of the profitability of trading ivory, governments will have added incentives to protect the elephants and ensure local land-owners do not act unilaterally.¹⁹³ Simultaneously, land-owners will see the value of preservation if money comes back into their community, and, therefore, be more willing to help safeguard elephants, and police against poachers.¹⁹⁴

¹⁸³ See *id.*

¹⁸⁴ See *id.*

¹⁸⁵ See *supra* notes 175–84.

¹⁸⁶ See Storey, *supra* note 21, at 381.

¹⁸⁷ See *id.* at 380 (referring to comments made by former head of the Kenya Wildlife Service).

¹⁸⁸ See Heimert, *supra* note 104, at 1482–86.

¹⁸⁹ See *id.*

¹⁹⁰ See CASTO, *supra* note 13, at 147.

¹⁹¹ See Heimert, *supra* note 104, at 1485.

¹⁹² See *id.*

¹⁹³ See *id.* at 1505–06.

¹⁹⁴ See *id.* at 1505. Even if corruption precludes all of the money from reaching local

The second reason culling should work is because of its strict regulatory nature, which lessens the likelihood that a new market will be opened in illegal ivory.¹⁹⁵ Conversely, other methods of preserving elephant populations probably *would* promote an illegal trade in ivory because they do not take effective account of the demand for the material.¹⁹⁶ Many conservationists, however, are suspicious; they believe re-opening the ivory trade, even in a limited capacity, will re-ignite an illegal international trade in ivory.¹⁹⁷ Casto, no doubt, would share this concern and worry that governments would use this new freedom to manipulate ivory and revenues for selfish purposes.¹⁹⁸

Admittedly, governments can abuse these new trading privileges.¹⁹⁹ For instance, nations may overestimate their elephant populations in order to justify killing more of the animals, and thereby gain more ivory.²⁰⁰ Yet a prescient government should realize such manipulation is foolish.²⁰¹ Failure to recognize this likely will have political repercussions.²⁰² After all, too much culling will eliminate a valuable resource from which significant revenue can be earned.²⁰³ In addition, a policy

communities, as long as the bulk of it does the exercise will be worthwhile. See *Namibia Factsheet*, *supra* note 111. In truth, if revenue from ivory sales is employed to bolster *national* police forces, there may not be a need for *local* policing efforts. See Heimert, *supra* note 104, at 1484.

¹⁹⁵ See *Namibia Factsheet*, *supra* note 111.

¹⁹⁶ See Heimert, *supra* note 104, at 1486–88. Despite some reasonable ideas underlying the ivory ban, the lack of resources to enforce it makes it likely that poaching and bribery will continue, and thereby vitiate the effectiveness of the ban. See *id.*

¹⁹⁷ See *Case Against Commercial Trade*, *supra* note 124.

¹⁹⁸ See CASTO, *supra* note 13, at 266.

¹⁹⁹ See generally Simon Coldham, *Legal Responses to State Corruption in Commonwealth Africa*, 39 J. AFR. L. 115 (1995).

²⁰⁰ See Heimert, *supra* note 104, at 1499.

²⁰¹ See *id.*

²⁰² This may be an overly optimistic appraisal of how effectively sub-Saharan African electoral systems function. See, e.g., William Wallis & Michael Holman, *The Path to the Presidency*, FIN. TIMES (London), Feb. 27, 1999, at 6 (describing an abundance of irregularities in the Nigerian electoral system). It is, nevertheless, better to leave control of elephants in the hands of a national government. See Heimert, *supra* note 104, at 1499–1500. They better represent the will of their people—those affected by elephants—than do Western governments and NGOs. See Marina Ottaway, *Keep Out of Africa*, FIN. TIMES (London), Feb. 25, 1999, at 14 (opining that Westerners should leave Africa alone to solve its own problems); Editorial, *Africa's Poison*, FIN. TIMES (London), Mar. 3, 1999, at 13 (arguing that the Western world should intervene less frequently in Africa, and let those states tackle their own problems).

²⁰³ There are those who are cynical about the ability of African governments to manage their resources effectively. See CASTO, *supra* note 13, at 270. Yet even these commentators should admit that a strictly regulated program gives countries the incentive to manage elephant populations carefully. See Heimert, *supra* note 104, at 1486. After all, the more responsible a government is, the greater its benefit from the ivory trade will be. See *id.* Another possible advantage of culling is that sharpshooters can target sick animals, and thereby improve the quality of the game visitors

of limited ivory trade derived from the tusks of culled elephants takes advantage of a fact that all parties concede—the ivory market is unlimited.²⁰⁴ Consumers, therefore, will be provided for, whether by legal or illegal means.²⁰⁵

Culling should work because “economics is the basic foundation of the program.”²⁰⁶ By simply balancing the costs of enforcing a ban, with the rewards derived from the ban, the merit of culling becomes clear.²⁰⁷ The cost of enforcing the ban is the losses local and national communities suffer because they can not earn maximum profit from elephants.²⁰⁸ These losses are compounded by money spent on internal policing of the trade, and of the animals themselves.²⁰⁹ These are sizable monetary losses, which can be justified only by an overall economic benefit.²¹⁰ Yet there are no financial advantages to enforcing the ban, especially on the micro-economic communal level where removal of the ban would be most welcomed.²¹¹

CONCLUSION

When a moratorium on the trade of ivory was initiated in 1989, proponents of the ban claimed it would reduce poaching and rejuvenate elephant populations.²¹² It did, a fact that has been misconstrued

get to see or hunt. See CASTO, *supra* note 13, at 149 (discussing a culling operation and the skill of the sharpshooters who do the culling). Because of the cost of safaris, this additional guarantee would make the country a more desirable place for tourists to visit and spend money. See *Meet Max*, *supra* note 172, at 83.

²⁰⁴ See *Case Against Commercial Trade*, *supra* note 124. This reveals one of the illogical notions of the animal activists' arguments. See *id.* If there is unlimited interest in elephant ivory, how will a ban quench it? See *id.* More probably, a ban will make people take increasingly desperate measures to acquire it. See Glennon, *supra* note 3, at 15–16 (citing animal rights groups who worried that, in the weeks before the ban went into effect, poachers would take drastic actions to accumulate ivory prior to the commencement of the ban).

²⁰⁵ See *Case Against Commercial Trade*, *supra* note 124.

²⁰⁶ CASTO, *supra* note 13, at 147 (quoting Namibian conservation official in charge of one of the country's culling operations).

²⁰⁷ See Richard A. Epstein, *The Moral and Practical Dilemmas of an Underground Economy*, 103 YALE L.J. 2157, 2167 (1994).

²⁰⁸ See *id.*

²⁰⁹ See Heimert, *supra* note 104, at 1487.

²¹⁰ See *id.*

²¹¹ See *id.* at 1491. Presumably, national governments earned international political capital by adhering to the ban, but it is less clear what local communities pestered by elephants gained from the exercise. See *Sustaining the Elephant*, *supra* note 109. As a result, the ban led to a perverse tragedy of the commons because it instigated *over-management* of an area to the detriment of the local community. See PLATER ET AL., *supra* note 46, at 16–20 (citing Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE, 13 Dec. 1968, 1243–48) (emphasis added).

²¹² See News Release of U.S. Department of Interior (D.O.I.) U.S. Fish and Wildlife Service,

to mean that a ban is the only way to protect elephants.²¹³ Actually, what the ban's success demonstrates is that strict regulation is the key to safeguarding elephant populations.²¹⁴ And, while careful guidelines may salvage elephant populations, they should not be considered successful unless they also benefit states and communities that live with the elephants.²¹⁵ Of course, in attempting to preserve something many consider a global resource, problems arise if a local community makes management choices that are incompatible with international beliefs.²¹⁶ Even more troubling, however, is when well-funded global actors dictate how local communities should act.²¹⁷

L. Dalton Casto, in his book *The Dilemmas of Africanization: Choices and Dangers for Sub-Saharan Africa*, seizes upon this tension and depicts the way it plays out across southern Africa.²¹⁸ Implicit in his analysis is a belief that African governments are too concerned with the short-term and, therefore, are unwilling to tackle difficult decisions that could bring lasting political, economic and societal gains.²¹⁹ He thus questions how effectively Africans can control their own resources in the absence of Western intervention.²²⁰

Undoubtedly, elephants are a global resource, yet more cogently, they are a national resource.²²¹ The debate over the ivory ban pits traditional conservation models of preservation at all costs against a

African Elephant to Remain Listed as Threatened: Conservation Efforts Prove Effective, Aug. 10, 1992, available in 1992 WL 193633. Ironically, and somewhat hypocritically, the U.S. still allows trade in ivory that was acquired by hunters or that was imported prior to the ban. *See id.*

²¹³ *See id.*

²¹⁴ *See* Heimert, *supra* note 104, at 1487 (contending that even less effective means of preserving elephants, such as protective fencing, can work if well-organized).

²¹⁵ *See Ivory Paradox*, *supra* note 107, at 16; Heimert, *supra* note 104, at 1489.

²¹⁶ *See* Storey, *supra* note 21, at 390.

²¹⁷ *See id.*; *New Ways*, *supra* note 89, at 11; *see also* Onno de Beaufort Wijnholds, *Maintaining an Indispensable Role*, FIN. TIMES (London), Mar. 1, 1999, at 16 (explicating why developing countries borrowing from the IMF should accede to the Fund's demands: "[conditions imposed by the Fund] provide the best hope of . . . improvement in the borrowing countr[y]").

²¹⁸ *See* CASTO, *supra* note 13, at 271.

²¹⁹ *See id.*

²²⁰ *See id.* at 273.

²²¹ *See Wildlife*, *supra* note 59 (referring to elephants and other wildlife that dwell in southern Africa as national resources). Some resources, such as the air and ocean water, arguably are outside the jurisdiction of any one country and are somewhat amenable to global administration. *See* Dunoff, *supra* note 10, at 1408. Yet land-dwelling, highly-mobile elephants do not fit into this sort of category. *See* Manning, *supra* note 163. If elephants are to be seen as a global resource, then presumably, American wildlife would fall into the same category. *See id.* The U.S. Forest Service, therefore, now should take orders from Zimbabwe about how to allocate land to the lumber industry. *See id.*

more realistic view of preserving both human and animal habitats.²²² The critical question about CITES, therefore, concerns state sovereignty, a point underscored during preparation for the vote to lift the ivory ban at COP10, where "acrimonious debate . . . showed wide philosophical rifts between Africa and the wealthy nations of Europe and America over issues such as sovereignty, international conservation standards and economic development."²²³ One commentator, who subscribes to the traditional view of conservation, has argued that the best way to preserve threatened species is for all states to implement and enforce trade bans vigilantly.²²⁴ Implicit in this argument is the idea that trade is an effective weapon with which to defend endangered wildlife.²²⁵ Perhaps, but trade is hardly a universal weapon; it more appropriately should be seen as a device the West uses to compel developing countries into acquiescence.²²⁶ Vigilant trade ban enforcement may be sensible *global* policy,²²⁷ but it is useless as *local* policy unless communities see the value of the wildlife they are to preserve.²²⁸

This viewpoint also raises complicated questions about who should control what resources.²²⁹ After all, states that tolerate problems associated with preserving resources found in their territory also should benefit from them.²³⁰ Yet CITES, like other international conservation agreements, does not make the value of membership outweigh the benefits of non-membership.²³¹ Poor countries who do act to pre-

²²² See Favre, *Risk of Extinction*, *supra* note 29, at 348.

²²³ *Ivory Trade Eased*, *supra* note 120. Since the ban was lifted, proponents of the ban contend that multiple elephants have been killed. See Munnion, *supra* note 11. Conversely, opponents of the ban blame conservationists and other animal activists for waging a spurious campaign about proliferating elephant slaughter. See Koro, *supra* note 115.

²²⁴ See Favre, *Risk of Extinction*, *supra* note 29, at 350.

²²⁵ See *id.*; Dunoff, *supra* note 10, at 1408-09.

²²⁶ See Aoki, *Neocolonialism*, *supra* note 114, at 20-21. Paradoxically, this inverts the idea that free, international trade should and will work to the benefit of all the world's nations. See RAJ BHALA, *INTERNATIONAL TRADE LAW* 5-78 (1996).

²²⁷ See Favre, *Risk of Extinction*, *supra* note 29, at 350.

²²⁸ See *Ivory Paradox*, *supra* note 107, at 16.

²²⁹ See generally *Developments in the Law—International Environmental Law*, 104 HARV. L. REV. 1482, 1492 (1991) [hereinafter *International Environmental Law*]. It should be noted that southern African countries likely would be more willing participants in the ivory ban and other CITES initiatives if they received more funding from the West to offset the losses they endure by abstaining from trading ivory. See William Wilson, *Environmental Law as Development Assistance*, 22 ENVTL. L. 953, 953 (1992).

²³⁰ See Wilson, *supra* note 229, at 953.

²³¹ See *International Environmental Law*, *supra* note 229, at 1492-93. Because international environmental customary law is so broad, states can claim almost any action complies with it. See *id.*

serve the environment may find themselves competitively disadvantaged against other similarly situated nations which opt not to take conservation measures.²³² Generally, because of the numerous problems that plague developing nations, environmental efforts can only be undertaken with Western assistance.²³³

To its credit, CITES does provide an incipient model within which to address the preservation of threatened species.²³⁴ It ultimately fails, though, because of its inherent disregard for local decision-makers.²³⁵ This unfortunately seems to be the thrust of most Western-led initiatives to study and enrich Africa.²³⁶ Conventions such as CITES should attempt to find middle ground between conservation efforts and human sustenance.²³⁷ Yet human interests largely are ignored.²³⁸ This exclusion is ironic because most often, Western efforts to intervene in the developing world are designed around the promotion of democratic ideals.²³⁹ CITES demonstrates the way Western efforts can stifle equality.²⁴⁰

Most worrisome is that this stultification is a direct product of Western liberalism.²⁴¹ Traditionally, the liberal elements of society have

²³² See Dunoff, *supra* note 10, at 1437.

²³³ See Wilson, *supra* note 229, at 964. Some development agencies, such as the United States Agency for International Development, which funds Zimbabwe's CAMPFIRE project, now are providing more development aid to help countries protect the environment. See *id.* at 967-70; Rembert, *supra* note 141.

²³⁴ See generally Sands & Bedecarre, *supra* note 30, at 800-05.

²³⁵ See *supra* notes 84-88 and accompanying text. Commentators do not intend to disregard community norms, but ultimately do so when rendering their opinion, inevitably based on Western beliefs. See Storey, *supra* note 21, at 387. As that author explains, conservationists hope that: "once local populations realize that conservation is in their own best interests, they will cooperate willingly." *Id.* (emphasis added).

²³⁶ See CASTO, *supra* note 13, at 265-73.

²³⁷ See Dunoff, *supra* note 10, at 1454.

²³⁸ For instance, a number of developing countries have refused to comply with international efforts to regulate their use of forest lands, claiming that forests are property of the sovereign nation. See James Brooke, *Delegates from 4 Nations Warm to High-Profile Role: Global Powerbroker*, N.Y. TIMES, June 12, 1992, at A10. Surely if forests which produce oxygen for the world can be owned by a sovereign nation, then elephants can. See *id.* As another commentator points out, if we are so concerned about dangers to the environment in foreign countries, why not impose strict penalties on our multi-national companies that destroy the ecosystems in other developing nations? See Wilson, *supra* note 229, at 975.

²³⁹ See *New Ways*, *supra* note 89, at 11.

²⁴⁰ See Sands & Bedecarre, *supra* note 30, at 800.

²⁴¹ See *id.* As discussed above, animal and environmental rights groups were the guiding force behind CITES, and the subsequent ivory ban. See *supra* notes 29-32; see also *Killing to Be Kind*, *supra* note 162, at 76 ("[l]eft-wing western whites stand accused of neo-imperialism on behalf of wild animals.").

provided the bulwark against large corporations and other entities which tend to be unconcerned about social justice for oppressed peoples.²⁴² Not only has that bulwark been solid, it also has been reliable.²⁴³

Unfortunately, many liberals have acted irresponsibly in the elephant ivory debate.²⁴⁴ This is a dangerous precedent to set. As global development continues, it becomes more likely that conflicts about sovereignty over the world's finite resources will escalate. The CITES debate portends increasingly imperialistic measures whenever the developing world deviates from Western recommendations.

²⁴² See generally GRAHAM HANCOCK, *LORDS OF POVERTY: THE POWER, PRESTIGE AND CORRUPTION OF THE INTERNATIONAL AID BUSINESS* (1989). Hancock is emblematic of the more typical liberal role in ensuring justice for oppressed people. See *id.*

²⁴³ See *id.*

²⁴⁴ See Sands & Bedecarre, *supra* note 30, at 800; see also Manning, *supra* note 163 ("[s]o many of our . . . views and policies are based on emotion, instead of good science and good conservation").

